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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, *et al.*,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF UNIVERSITY FACULTY FOR LIFE AS *AMICUS CURIAE* IN SUPPORT OF STATE OF PENNSYLVANIA

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INTEREST OF THE *AMICUS CURIAE* [1]

University Faculty for Life (UFL) is a multidisciplinary, educational association formed in 1989 of more than 340 faculty members from 80 colleges and universities across the country. UFL sponsors national and international educational conferences on social and philosophical issues to foster support for the sanctity of human life. UFL members publish books and articles in peer-review journals on these issues. Among UFL's purposes are the encouragement and dissemination of scholarly research on bioethical issues. To that end, UFL desires to see that social science is used reliably in the formulation of public policy on abortion.

SUMMARY OF ARGUMENT

This Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), cannot be justified on legal, medical or historical grounds. Nor, in the judgment of this *amicus*, can it be based on sociological grounds. In purporting to find a right to choose abortion in the Constitution, this Court in *Roe* primarily emphasized the deleterious social and familial consequences of unwanted pregnancy. In so doing, the Court made two key assumptions: first, that restrictive abortion laws have no positive effect on the behavior of men and women, and second, that the "unwanted pregnancies" of women who have been denied abortion will result in "unwanted children" who will suffer various dysfunctions.

As this brief demonstrates, neither assumption is warranted. First, parental consent and notice laws, like the Pennsylvania law, are associated with positive trends in teen pregnancy prevention. During the four and one-half years that the Minnesota parental notice law was in effect, adolescent pregnancy, birth, and abortion rates declined significantly, without an increase in late-term abortions. This experience was largely replicated in Massachusetts when its parental consent law was in effect. At the same

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[1] This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk of this Court.

time, states which cut off public funding for abortion also experienced fewer pregnancies, births, and abortions among Medicaid-eligible women. Second, assumptions that denied abortion predictably results in women abusing their children or in children suffering severe social or psychological dysfunction—like suicide, homicide, delinquency, or educational failure—are erroneous. Studies of women denied abortion show that a high percentage of women and children have positive outcomes and that denied abortion imposes no long-term or severely negative outcome on any significant percentage of women or children. Therefore, research and experience have confirmed the positive effect of restrictive laws in supporting responsible behavior and in inhibiting self-destructive behavior, and have shown the resilience of women and children in overcoming the "unwantedness" of untimely pregnancies to establish fulfilling lives and positive, enduring relationships.

ARGUMENT

I. THE COMPARATIVE CLAIMS OF SOCIAL SCIENCE ABOUT ABORTION DEMONSTRATE THE RATIONAL BASIS FOR ABORTION LAWS.

At least since *Muller v. Oregon*, 208 U.S. 412 (1908), this Court has explicitly relied on social science to decide constitutional cases. However, when the basis for those decisions has been called into question, this Court has "bow[ed] to the lessons of experience and the force of better reasoning. . . ." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-408 (1932) (Brandeis, J., dissenting). Thus, in *Plessy v. Ferguson*, 163 U.S. 537 (1896), this Court relied on contemporary assumptions about inherent racial inferiority to uphold a "right" to segregation in American society, assumptions that have been thoroughly rejected. *Id.* at 551; *Brown v. Board of Education*, 347 U.S. 483 (1954). And in *Buck v. Bell*, 274 U.S. 200 (1927), this Court upheld a statute providing for the involuntary sterilization of Carrie Buck, based on assumptions about heredity and mental disabilities

which were subsequently rejected. *Id.* at 205-207.[2] *Cf. Skinner v. Oklahoma*, 316 U.S. 535 (1942). As Harry Kalven observed:

> The legal career of sterilization is thus a useful example, first, of the law too quickly adopting a popularized scientific premise without exposing it to adequate scrutiny, and second, of the law's consequent difficulty in keeping abreast of the revisions of scientific hypotheses.

Kalven, *A Special Corner of Civil Liberties: A Legal View I*, 31 N.Y.U.L. Rev. 1223, 1234 (1956).[3]

Roe v. Wade, 410 U.S. 113 (1973), and its progeny are a tragic example of the problems Kalven identified. *Roe* was predicated upon social science propositions that were subject to considerable dispute at the time, continue to be questioned, and, in some cases, have been entirely refuted. First, this Court in *Roe* reached decisive con-

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[2] These assumptions were not borne out in the life of Carrie Buck. "Shortly after the Court's opinion was announced, Carrie Buck was sterilized. She was eventually discharged from the Virginia Colony for Epileptics and Feebleminded. She married twice—her first husband died after twenty-four years of marriage—sang in the Methodist Church choir, and took work helping a family in Front Royal, Virginia, to care for an elderly relative. She died in a state-operated nursing home near Waynesboro, Virginia, in 1983, at the age of seventy-seven.

Considerable doubt surrounds her imbecility today. In fact, she was said to display substantial intelligence as well as kindness, to be an avid reader and a lucid conversationalist, even in her last days. Her daughter, Vivian, lived only eight years, but she, too, contradicted institutional and judicial estimates of her mental capacities. She went through the second grade in school and was considered by her teachers to be 'very bright.'" L. Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* 603 (1991).

[3] For example, briefs by abortion advocates, concerning the maturity of minors to consider abortion without parental guidance, have been criticized for overstating the findings of social science. Gardner, et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, American Psychologist 895 (June 1989). *Cf.* Rogers, *Utilization of Data in the Ongoing Public Debate Over Abortion*, 25 Family Perspective 179 (1991).

clusions about the history of abortion based almost exclusively on two law review articles. 410 U.S. at 136-162.[4] Those conclusions have been exploded by more recent scholarship which has been sensitive to the law's limited ability to protect the unborn child in historical eras of primitive medical science.[5] Second, *Roe* was predicated on the conclusion that abortion was safer (for the mother) than childbirth. *Id.* at 149, 163. Yet, in this century, both childbirth and abortion have become safer (for women) through advances in medical science.[6] This issue, however, has become superfluous: the data used are far from reliable; the difference in safety is negligible in terms of the number of individual cases; and the relative safety of the two is wholly immaterial in the counsel that doctors provide, or the reasons that women give, for 95% of the abortions now performed.[7]

Finally, the Court in *Roe* made negative assumptions about the impact on women and children of prohibiting elective abortion. The Court concluded that human behavior cannot be positively influenced by abortion law, that even if abortion is restricted it will not affect the number of women who experience undesired pregnancies or seek abortions, that the restriction of abortion results in more unwanted births, and that children who are unwanted during pregnancy will be unwanted

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[4] Means, *The Phoenix of Abortional Freedom*, 17 N.Y.L.F. 335 (1971); Means, *The Law of New York Concerning Abortion*, 14 N.Y.L.F. 411 (1968).

[5] *See* the Brief of the American Academy of Medical Ethics as *Amicus Curiae* and the Brief of Certain American State Legislators as *Amici Curiae* in Support of Pennsylvania.

[6] In Illinois, for example, maternal deaths (defined as deaths attributed to "complications of pregnancy, childbirth, and the puerperium") dropped from 1,141 in 1920, to 699 in 1930, to 114 in 1950, to 40 in 1972 (the last full year before *Roe*). Between 1972 and 1981, however, maternal deaths dropped from 40 to 27, and the rate dropped from 2.2 to 1.5. Illinois Dept. of Public Health, *Vital Statistics Illinois 1981* I.11 (March, 1984) (Table A).

[7] *See* Brief of the American Association of Prolife Obstetricians and Gynecologists, *et al.*, as *Amicus Curiae*.

during childhood, resulting in serious social dysfunctions. 410 U.S. at 153, 165. These conclusions are not supported by the experience since *Roe*.[8] In fact, the impact of those few abortion regulations enforced since *Roe* demonstrate that restrictions on access to abortion are associated with a reduction in both the abortion and the pregnancy rate. This supports the determination that abortion restrictions actually encourage personal responsibility and reduce the number of women who experience the stress of an unwanted pregnancy.

The comparative claims of social science about the relative effects of abortion, or restrictive abortion laws, on women and children do not support a "fundamental" right to elective abortion. Abortion laws do have a rational basis in protecting the unborn child, inhibiting unplanned pregnancy and abortion, and protecting women from social pressure to abort and the physical or mental injury that some women will suffer. Rogers, *et al.*, *Psychological Impact of Abortion: Methodological and Outcomes Summary of Empirical Research Between 1966 and 1988*, 10 Health Care for Women Inter'l 347 (1989).

II. RESTRICTIVE ABORTION LAWS ARE ASSOCIATED WITH POSITIVE TRENDS IN PREGNANCY, ABORTION AND BIRTH RATES.

This Court's abortion decisions have left almost no regulatory authority to the States. Nevertheless, the experience in those States that have exercised that authority

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[8] Counsel for the abortion clinic in *Webster* claimed that an abortion rate of thirty percent (of all pregnancies) "has not changed one whit from the time that the Constitution was enacted through the 1800's and through the 1900's." Wardle, *"Time Enough": Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 Fla. L. Rev. 881, 948 (1989). Yet, since *Roe*, "the number of [induced] abortions has more than doubled, the rate of [induced] abortion has nearly doubled, and the ratio of [induced] abortions has increased by over fifty percent." *Id.* at 948, 985. And the nineteen years since *Roe* legalized elective abortion nationwide have seen a significant increase in the rate of repeat (two or more) abortions—from 15.2% to 42.9%. *Id.* at 985.

discloses that abortion regulations may result in lower pregnancy, abortion and birth rates. The following evidence suggests that returning full authority to the States to regulate abortion will have positive public health consequences by reducing the incidence of unwanted pregnancies.

A. Laws Requiring Parental Involvement Are Associated With Reductions In Teen Pregnancy Rates.

1. *Minnesota's teen pregnancy rate dropped after its parental notice law took effect.*

During the four and one-half years the Minnesota parental notice law was in effect and enforced (August 1, 1981 to March 2, 1986), teen abortion and pregnancy rates dropped substantially; and the teen birth rate continued its slow decline.[9] This brief presents an analysis of the pregnancy,[10] abortion, and birth rates[11] in Minnesota for two periods—one before the law took effect (the pre-enactment period 1978-1980) and one during its enforcement (the post-enactment period 1982-1985). *See* Rogers, *et al.*, *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 Am. J. Pub. Health 294 (1991). The Rogers analysis relied upon demographic data the Minnesota Department of Health collected from Minnesota abortion providers under mandatory statutory reporting requirements. *Id.* at 295; Minn. Stat. Ann. 145.413 (West 1989). These data include the number of teen pregnancies, abortions and births to Minnesota resi-

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[9] Minn. Stat. Ann. 144.343 (2)-(7) (West 1989); *Hodgson v. Minnesota*, 648 F.Supp. 756, 760, 781 (D. Minn. 1986), *aff'd and rev'd in part*, 853 F.2d 1452, 1455 (8th Cir. 1988), *aff'd*, 110 S.Ct. 2926 (1990).

[10] Pregnancies are approximated by the sum of induced abortions, live births and fetal deaths.

[11] Rates, as opposed to the raw numbers, take into account changes in the population. In this study, rates equal the occurrence (incidence) of a given phenomenon per 1000 females. Thus, for any particular age category, the numerator represents the incidence of the phenomenon and the denominator is the population in thousands (phenomenon/population).

dents and the gestational age at which the abortions have been performed.[12] Rogers at 295.

For the Rogers analysis, the data are organized in age-specific groupings appropriate for an evaluation of the law—ages 15-17, 18-19, and 20-44. The researchers assumed that any change in the incidence of pregnancy, abortion and childbirth due to the notice law would fall most heavily on teens age 15-17, who were directly affected by the notice law (Minn. Stat. Ann. 645.451 (West 1989)). They further assumed that the law would impact less heavily on teens age 18-19 who recently would have been subject to the law.[13] Although a few women who fell in the 20-44 age group in later years would have been subject to the law in the earlier years of its enforcement, proportionately the numbers of such women are very small; and these women were further removed from the effect of the law than the 18-19 year-olds. Therefore, the researchers assumed that this 20-44 age group would be least affected by the law. *Id.*

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[12] The data analyzed by Rogers do not include females whose ages were unknown or non-Minnesota residents. Live births to and fetal deaths of Minnesota residents are included regardless of whether they occurred inside or outside of Minnesota. Induced abortions reflect only those performed in the state since the Department of Health does not collect data on abortions performed on Minnesota residents outside the state. Because yearly population data by sex and appropriate age group were not available from the Census Bureau, the Department provided official population estimates. Rogers at 295.

[13] Some teens who gave birth at 18 might have been 17 at the time they became pregnant and thus were directly affected by the law. Those who were 18 in 1985 were subject to the law from 1981-1984; and the group as a whole reasonably could have been influenced by the law through socialization, including schooling and peer contacts. Additionally, it is possible that behaviors "learned" as a result of the law may have remained with the young women even when they were no longer under the law's influence. For instance, a girl who was encouraged to practice abstinence or contraception as a minor may continue to practice that behavior in her adult years.

Significantly, the analysis of the data reveals that between the pre- and post-enactment years, pregnancy and abortion rates declined substantially for the teenage groups. Birth rates continued to decline slowly in line with long-term trends.

a. *Teen Pregnancies (age 15-17) fell by more than 20%.*

For the 15-17 age group, the average pregnancy rate during the post-enactment period (29.3 per 1000 between 1982 and 1985) was 20.4% lower than the average rate during the pre-enactment period (36.8 between 1978 and 1980). More specifically, between 1978 and 1980, the pregnancy rate hovered around 37 per 1000. After the law took effect, it declined to a low of 27.5 in 1983 and then rose slightly to 29.7 in 1985. *See* Table 2 in the Appendix to this Brief.

For the 18-19 age group, the pregnancy rate rose from 91.8 in 1978 to a high of 100.2 in 1980. It fell to 93.5 in 1982 and stabilized near 83 between 1983 and 1985. Thus, the average pregnancy rate declined 11.1% (from 96 to 85.3) between the pre-enactment and post-enactment periods. By contrast, the 20-44 age group experienced almost no change in its pregnancy rate between the two time periods—only a 1.3% drop. *See* Table 2.

b. *Teen Abortions (15-17) fell by more than 28%.*

After the notice law took effect, the abortion rate declined for 15-17 and 18-19 year-olds. Significantly, the decline was substantially greater for teens age 15-17 than for those age 18-19. The abortion rate actually increased for women age 20-44 who were not subject to the law. Rogers at 295. Table 2 shows that for 15-17 year-olds, the average abortion rate dropped 28.4% (from 19.0 to 13.6) between the pre- and post-enactment periods. Prior to the law, the abortion rate for these teens rose from 18.25 in 1978 to a high of 19.57 in 1980. In 1982, it fell to 14.25, reached a low of 12.80 in 1983 and then rose to 14.54 in 1985.

The abortion rate also fell for the 18-19 age group while the notice law was in effect. Although the rate rose from 35.71 in 1978 to a high of 40.26 in 1980, it fell to 36.45 in 1982 and then to 34.07 in 1985. Thus, the average abortion rate for 18-19 year-olds fell 9.4% (from 38.2 to 34.6) between the two time periods. For the 20-44 age group, it increased 4.5% (from 13.3 to 13.9).

Critics of parental involvement laws claim that these laws delay minors from having abortions, pushing them into later gestational periods, thereby increasing the risk of abortion.[14] However, Rogers found that after the notice law went into effect, the late abortion rate (after 12 weeks) actually *declined* for teens age 15-17. It increased for women age 20-44 and remained nearly constant for women age 18-19. *Id.* at 296. "The early abortion rate (those performed at 12 weeks or less) "closely track[ed] the overall abortion rate[,]" which declined for both groups of teenagers.[15] *Id.*

Moreover, there is no evidence that significant numbers of teens left or migrated from Minnesota to evade the law. Four states border Minnesota: North Dakota, South Dakota, Iowa and Wisconsin. North Dakota has had a parental consent law in effect since 1981. N.D. Cent. Code 14-02.1-03.1 (1981 & 1989 Supp.). South Dakota reports only 5, 19, 20, 30, 20 and 17 abortions performed on Minnesota teens age 19 and under during 1981-1986, respectively. *South Dakota Vital Statistics* (1982-1987).

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[14] In fact, *Amici* NAACP Legal Defense and Educational Fund, *et al.*, claim that the Minnesota parental notice requirement "increased the number of minors who obtained second trimester abortions by 26.5%." Br. at 28. The data from Minnesota establish that this claim is patently false.

[15] In all age groups, the late-to-early abortion ratio (late abortion rate/early abortion rate, *i.e.*, the number of late abortions for every early abortion) increased after the law took effect. The increase for ages 15-17 was greater than that for women age 20-44, but not significantly greater than that for 18-19 year-olds. When examined closely, the data reveal that a steep decline in early abortions, and not an increase in late abortions, accounts for the increased ratio in 15-17 year-olds. *Id.*

Iowa had no parental or reporting law in effect. Wisconsin had no mandated reporting before 1987. However, an independent researcher concluded that "there is little evidence to indicate large numbers of Minnesota youth [were] leaving the state for abortion. . . ." Blum, *et al.*, *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. Pub. Health 619, 620 (1987). This is confirmed by data from the Alan Guttmacher Institute (AGI), which have been adjusted to reflect state residence, that show a sharp decline in the abortion and pregnancy rates for 15-17 year-olds in Minnesota after the parental notice law went into effect. AGI, *Teenage Pregnancy in the United States: The Scope of the Problem and State Responses* 38 (1989).

c. ***Teen Births continued their decline.***

Birth rates decreased for all age groups after the notice law took effect.[16] However, the decline was substantially greater for teens in the 15-17 and 18-19 age groups than for women age 20-44. Rogers at 296. For

[16] In *Hodgson v. Minnesota*, the plaintiffs claimed that the notice law caused a 38.4% increase in the birth rate to teens age 15-17 by relying only on statistics for residents of the City of Minneapolis between 1980 and 1984. *See* Brief *Amicus Curiae* of the Association of American Physicians and Surgeons in *Hodgson* at 25-29. However, statistics throughout the state show that this increase was unique to teens in Minneapolis, who represent only 6% of the state's population of 15-17 year-olds, and did not occur in the greater metropolitan area of Minneapolis or in the state as a whole. *Id.* Also, when the Minneapolis population is examined in more detail, the increase in births to girls under 18 is largely confined to the minority population, specifically the population of Asian-Pacifics. Since it is implausible that the notice law would selectively affect Asian-Pacifics more than other ethnic groups in Minneapolis, other explanations for that city's increase in teen birth rate need to be explored. One explanation that is supported by available data is that there was a substantial increase in the population of Asian-Pacific teens between 1980 and 1987 in Minneapolis and in the percentage of births to minors for this population. *Id.*; Rogers, *Inner-city Birth Rates Following Enactment of the Minnesota Parental Notification Law*, Law and Human Behavior (forthcoming 1992).

the 15-17 age group, the birth rate fell 1.8% between 1978 and 1980 (right before the law took effect), but the average rate fell 12.4% (from 17.7 to 15.5) between the pre- and post-enactment periods. The average birth rate also fell 12.4% (from 57.3 to 50.2) for 18-19 year-olds. For the 20-44 age group, it fell only 2.3% (from 78.0 to 76.2) between the two periods.

An evaluation of these pregnancy, abortion and birth rates between the pre- and post-enactment years strongly supports the conclusion that the notice law effectively caused a decrease in the teen pregnancy rate. It seems undisputed that the notice law did directly decrease abortion rates. Since birth rates simultaneously decreased, the law must have decreased abortion rates by affecting pregnancy rates. Obviously, when the abortion rate falls 28.4% for 15-17 year-olds and 9.4% for 18-19 year-olds, while the birth rate simultaneously falls 12.4% for both age groups, the pregnancy rate has declined. Thus, the notice law apparently changed adolescent behavior by encouraging teens to prevent pregnancy.

2. *Massachusetts' teen pregnancy rate dropped after its parental consent law took effect.*

Similarly, the teen pregnancy rate in Massachusetts declined significantly after its parental consent law went into effect on April 23, 1981.[17] In fact, the average pregnancy rate for minors decreased 16.6% between the time immediately before and after the law took effect. *See* Cartoof & Klerman, *Parental Consent for Abortion: Im-*

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[17] This law requires the consent of both parents or a Superior Court judge before an unmarried woman under age 18 can obtain an abortion. Mass. Ann. Laws ch. 112, § 12S (Michie/Law. Co-op. 1985). The former parental consent provision (Mass. Gen. Laws Ann. ch. 112, § 12S (West Supp. 1979)) was declared unconstitutional by the Supreme Court in *Bellotti v. Baird*, 443 U.S. 622 (1979). The current provision amended the original to cure the defects and, as amended, was upheld. *See Planned Parenthood League of Mass. v. Bellotti*, 499 F. Supp. 215 (D. Mass. 1980), *aff'd in part, vacated in part on other grounds and remanded*, 641 F.2d 1006 (1st Cir. 1981).

pact of the Massachusetts Law, 76 Am. J. Pub. Health 397 (1986).

Table 3 reports the impact of the Massachusetts law on Massachusetts minors age 12-17 based on the data in Cartoof and Klerman's article.[18] With regard to the birth rate for these minors, it peaked in 1979 at 8.9 per 1000. In 1980, when the consent law was passed, it dropped to 8.4 and then remained fairly constant through 1982. *Id.* at 399. The abortion rate also peaked in 1979 at 18.2. Then it dropped to 15.5 in Jan.-April 1981, just prior to the law's implementation. From May-Dec. 1981, when the law was in effect, it hit a low of 13.1 and then remained fairly constant. The pregnancy rate followed a similar pattern. It hit a high of 27.1 in 1979. In 1980, it dropped to 25.8 and then down to 23.7 during the first part of 1981. After the law went into effect, it dropped again to 21.4 and then stayed fairly stable.

Table 3 also provides the average birth, abortion and pregnancy rates for two time periods—one prior to the law's implementation (1978-1980) and one afterwards (May 1981-1982)—and then compares the change that took place. It shows that the average birth rate dropped 3.4% from 8.7 to 8.4; the average abortion rate fell

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[18] Cartoof & Klerman obtained data on the number of abortions performed in the state each month from August 1977 through December 1982 from the Massachusetts Department of Public Health. They also collected monthly records of the number of Massachusetts minors who obtained abortions in five surrounding states—New Hampshire, Rhode Island, Connecticut, Maine and New York—during 1980-82. *Id.* at 397. Data on abortions performed in Maine on Massachusetts minors were not available until April 1981. *Id.* at 398. Unfortunately, the researchers could not get data on the number of Massachusetts minors who went out of the state for abortions prior to the law's implementation. However, they concluded that "the effect of the omission of out-of-state abortions to Massachusetts minors in the preintervention period is compensated for by the inclusion of in-state abortions to non-Massachusetts minors during these 45 months." *Id.* at 399. The Department provided data on births to Massachusetts minors from 1970-82. *Id.* at 397.

22.7% from 17.2 to 13.3; and the average pregnancy rate fell 16.6% from 25.9 to 21.6.

This drop in the pregnancy rate is especially remarkable since Massachusetts is a small state surrounded by other states that did not have parental involvement laws at the time. These factors probably account for the marked and immediate shift in the number of minors that left Massachusetts to get abortions in the surrounding states after the law required parental consent. *Id.* at 398. Nevertheless, even though more teens left the state to get abortions after the law went into effect, the total number of Massachusetts teens getting abortions (in and out of state) declined even more. As a result, both the teen abortion and pregnancy rates declined.[19]

B. Abortions, Births And Pregnancies Among Medicaid-eligible Women Dropped In States That Cut Off Public Funding For Elective Abortions.

In 1977 and 1978, the Hyde Amendment limited the use of federal Medicaid dollars that could pay for abortions to those done when the life of the mother was endangered by continuation of the pregnancy, when severe and long-lasting physical health damage could result from the continued pregnancy, and when the pregnancy resulted from rape or incest. *See Harris v. McRae*, 448 U.S. 297, 300-306 (1980) (discussion of historical background of Hyde Amendment). Although originally passed in 1976, the Hyde Amendment did not take effect until August 4, 1977, because of a multitude of court challenges.[20]

The impact of this funding cutoff was studied and reported on by Trussell, *et al.*, in *The Impact of Restricting Medicaid Financing for Abortion*, 12 Fam. Plan. Persp.

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[19] Therefore, the data presented by Cartoof and Klerman contradict their own conclusion that "Massachusetts minors continue to conceive, abort, and give birth in the same proportions as before the law was implemented." *Id.* at 400.

[20] Order entered in open court by Judge Dooling lifting his injunction against the enforcement of the Hyde Amendment in *McRae v. Califano*, Nos. 76C1804, 76C1805 (E.D.N.Y.).

120 (1980). Trussell studied the number of abortions and births to Medicaid-eligible women in Ohio, Georgia and Michigan before and after the Hyde Amendment went into effect (1977 and 1978). *Id.* at 122-123. Although Ohio and Georgia adopted the federal restrictions on abortion funding, Michigan continued to pay for abortions for Medicaid-eligible women with state funds. *Id.* at 122, 128-29. Since Michigan continued to fund abortions publicly, Trussell expected and found very little change in the number of abortions or live births among Medicaid-eligible women from 1977 to 1978. As Table 1 shows, the number of abortions went down by 150 from 7213 to 7063. There were 6 additional spontaneous abortions and 74 additional live births. Therefore, the number of pregnancies dropped by 0.4%. *Id.* at 127-129.

However, in Ohio, the number of induced abortions fell by 1367 from 3958 to 2591; and there were 20 fewer spontaneous abortions. Moreover, this drop in abortions was not replaced by an increase in the number of live births. In fact, there were 224 fewer births to Medicaid-eligible women in 1978, resulting in a 15.1% drop in the number of pregnancies. Similarly, in Georgia, the number of induced abortions declined by 310 from 1474 to 1164; spontaneous abortions fell by 2; and live births decreased by 25. Therefore, the number of pregnancies went down by 3.8%. *Id.* Obviously, the lack of public funds did not result in an increase in "unwanted" births. Instead, fewer children were conceived.[21] Thus, whether

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[21] Although Trussell, *et al.*, relate a couple of undocumented tragic anecdotes about women who supposedly died from self-induced abortions as a result of the restriction on public funding, they admit that the Center for Disease Control only linked "four deaths of indigent women from illegal or self-induced abortions to the unavailability of Medicaid financing" and that "the relatively small number suggests that there was little demographic impact from recourse to illegal or self-induced abortion." *Id.* at 121, 129. *Cf.* Petitti & Cates, *Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age*, 67 Am. J. Pub. Health 860 (1977) (predicting up to 90 deaths annually if publicly funded abortions were restricted by the Hyde

the law affects minors or adults, restrictive laws apparently result in fewer pregnancies, abortions and births.

III. STUDIES OF WOMEN DENIED ABORTION SHOW THAT A HIGH PERCENTAGE OF WOMEN AND CHILDREN HAVE POSITIVE OUTCOMES AND THAT DENIED ABORTION IMPOSES NO LONG-TERM, NEGATIVE OUTCOMES ON ANY SIGNIFICANT PERCENTAGE OF WOMEN OR THEIR CHILDREN.

From *Roe* to *Webster*, advocates like the City of New York have contended that elective abortion serves society by preventing the birth of "unwanted children" who psychologically and financially burden families. Brief for the City of New York, *et al.*, as *Amicus Curiae* at 5 & n.5. Indeed, the rationale in *Roe* for the privacy interests of the mother was primarily based on this proposition. Allegedly, mothers who bear an "unwanted child" suffer "a distressful life and future. Psychological harm may be imminent." *Roe*, 410 U.S. at 153.[22] Likewise, children raised by mothers who are denied abortion allegedly grow up more troubled.[23]

Amendment) *with* Gold & Cates, *Restriction of Federal Funds for Abortion: 18 Months Later*, 69 Am. J. Pub. Health 929 (1979) (finding only three deaths "associated to some degree" with funding restrictions).

[22] Both Jane Roe in *Roe* and Jane Doe in *Doe* were allegedly denied abortion, never had an abortion, and eventually gave birth. Richardson, "Child of 'Jane Roe' found, searcher says," Washington Times, June 29, 1989, at A-1; Sharpe, "Child from Roe v. Wade located," Cincinnati Enquirer, June 26, 1989. Jane Doe has an ongoing relationship with her daughter. Associated Press, "Abortion Plaintiff, Daughter Reunited," Los Angeles Times, Dec. 10, 1989.

[23] *See also Beal v. Doe*, 432 U.S. 438, 447-48 n.15 (1977); *id.* at 451 n. (Brennan, J., dissenting); *id.* at 456 (Marshall, J., dissenting) (the statutes "brutally coerce poor women to bear children whom society will scorn for every day of their lives. Many thousands of unwanted minority and mixed-race children now spend blighted lives. . . ."); *id.* at 462 ("The effect will be to relegate millions of people to lives of poverty and despair."); *id.* at 463 (Blackmun, J., dissenting) ("And so the cancer of poverty will

A. Denied Abortion Has No Long-term Or Severely Negative Impact On The Vast Majority Of Women.

Although many women may have initial, negative reactions to an unplanned pregnancy,[24] those same women generally (though not invariably) experience positive transformations toward their children once born.[25] A

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continue to grow."); *Maher v. Roe*, 432 U.S. at 484 (Brennan, J., dissenting); *Bellotti v. Baird*, 443 U.S. at 642 (Powell, J.); *Harris v. McRae*, 448 U.S. at 330-31 & n.4 (Brennan, J., dissenting); *id.* at 338-346 (Marshall, J., dissenting).

[24] There is no competent evidence that a woman's attitude toward her unborn child has any measurable relationship to possible complications of pregnancy. A number of studies, noted by David, found that unwantedness and denied abortion did not adversely affect pregnancy, prematurity, perinatal mortality, delivery, or presence of fetal malformations. David at 50-51; Hultin & Ottosson, *Perinatal Conditions of Unwanted Children*, Acta Psychiat. Scand. Supp. No. 221, 59 (1971); Arfwidsson & Ottosson, *Pregnancy and Delivery of Unwanted Children*, Acta Psychiat. Scand. Supp. No. 221, 77 (1971); Blomberg, *Influence of maternal distress during pregnancy on complications in pregnancy and delivery*, 62 Acta Psychiat. Scand. 399 (1980). In the Prague study, more medical complications during pregnancy "were found among the control group of mothers (35 percent) than among those who were denied abortion (26 percent); the same is true for puerperium complications (17 percent, compared to nine percent)." Dytrych, 7 Fam. Plan. Perspect. at 167. "Compared to the AP [accepted pregnancy] children, the UP [unwanted pregnancy] children did not show more signs of major biological stress during their intrauterine life." David at 111.

[25] Most studies show that upwards of 85% of women who are denied abortion eventually carry the child to term, rather than otherwise obtain legal or illegal abortion, or experience spontaneous abortion. Three studies found that about 85% of women denied abortion carried the child to term. Hultin & Ottosson, *Perinatal Conditions of Unwanted Children*, Acta Psychiat. Scand. Supp. 221, at 62 (1971) (citing Hook (1963), Hultgren, (1959), and Lindberg (1948)). A 1971 Swedish study found that 81.2% of the women carried the child to term. *Id.* at 59. A fifth study of Swedish women during World War II found that 65% carried to term. Forssman & Thuwe, *One Hundred and Twenty Children Born After Application for Therapeutic Abortion Denied*, 42 Acta Psychiat. Scand. 71 (1966). *See also*, David at 47.

study of 249 Stockholm women concluded that 81% of the women denied abortion who gave birth (173 of 213) were satisfied with their denied abortion and with their present condition with the child. Hook, *Refused Abortion*, Acta Psychiat. Scand. Supp. No. 168, 109 (1963). Likewise, a Prague study showed that "[t]he subsequent development of the mother's relationship with the child had, however, proceeded in such a way as to obliterate any difference between the groups [unwanted pregnancy mothers (UP) and accepted pregnancy mothers (AP)]. Accordingly, the mothers of both groups expressed about the same satisfaction with the child." H. David, Z. Dytrych, Z. Matejcek & V. Schuller, eds., *Born Unwanted: Developmental Effects of Denied Abortion* 77 (1988) [hereinafter cited as David].[26] Of the UP mothers, 92% described their level of satisfaction with the child as "average" or "satisfied," and 86.4% viewed the change produced in the family by the child's birth as "favorable" or "none at all." David at 77 (Table 6.21). Significantly, when the UP children were nine, 38% of their mothers "placed themselves in a category of not having asked for an induced abortion" when they were pregnant with the child. Dytrych, *et al.*, *Children Born to Women Denied Abortion*, 7 Fam. Plan. Persp. 165, 171 (1975); David at 75-76. Consequently, the authors of the Prague study concluded that "[b]y and large, the study group mothers did move from initial rejection to ultimate acceptance" of their children. Dytrych, 7 Fam. Plan. Persp. at 171.[27]

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[26] David elaborates: "only a small group of UP [unwanted pregnancy] children rejected at the outset of pregnancy remain, in their mothers' words, still unaccepted at the end of eight years. . . . Notwithstanding the tendency of the UP mothers to distort facts to suit social conventions, most of them must be credited with a significant positive shift in attitudes toward the child, particularly on the conscious level." *Id.* at 78-79.

[27] The Prague study points up the transitory nature of "unwantedness" in many cases. "As will be noted in the Prague studies, not every child unwanted during pregnancy remained unwanted. Some became wanted gradually, usually as the result of

B. Denied Abortion Has No Long-term Or Severely Negative Impact On The Vast Majority of Children.

Abortion advocates cite various studies to support the proposition that the majority of "unwanted" children experience negative outcomes as a result of denied abortion. These studies uniformly ignore the critical philosophical questions at stake. If the question is whether it is better for children to be wanted than unwanted, these "studies" are hardly needed. If the question is whether it is better to be dead than unwanted, these studies never address, and cannot resolve, this issue. Yet, the answer to this question is presumed in the focus on unwantedness; and it is precisely on this point that the studies lack any predictive value. That is, they are unable to predict whether a child will suffer developmental detriments, and if so, how severe these detriments will be, whether any alternative supporting relationships or networks will offset the detriments, and what the long-term outcome will be.

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a variety of interacting factors and circumstances. Thus, a child originally unwanted for seemingly economic reasons may benefit from changing parental attitudes as the economic situation improves. However, no matter how important, economic factors may not be decisive. Parental maturity, community support, and the help of friends and grandparents may be equally important contributors to changing the perception of what was once considered a hopeless situation. Experiencing life with a child may also create conditions for changing attitudes from negative to positive." David at 33.

Other studies establish that denied abortion is not a reliable indicator of future child abuse. *See* Benedict, *Maternal Perinatal Risk Factors and Child Abuse*, 9 Child Abuse and Neglect 217 (1985); Kotelchuck, *Child Abuse and Neglect: Prediction and Misclassification*, in R. Starr, Jr., ed., *Child Abuse Prediction: Policy Implications* (1982); Garbarino, *Some Ecological Correlates of Child Abuse: The Impact of Socioeconomic Stress on Mothers*, 47 Child Development 178 (1976); Ney, *Relationship Between Abortion and Child Abuse*, 24 Can. J. Psychiat. 610 (1979); Pohlman, *Unwanted Conceptions: Research on Undesirable Consequences*, 14 Eugenics Quarterly 143 (1967); Zimlich & Watson, *Maternal Attitudes of Acceptance and Rejection During and After Pregnancy*, 23 Am. J. Orthopsychiat. 570 (1953).

Beyond the philosophical questions, social science studies of denied abortion are subject to a number of methodological guidelines, which must be followed in order for the conclusions to be valid. The key requirement is called *internal validity*. W. Reid & A. Smith, *Research in Social Work* 121 (1981). In this context, the issue is whether the observed differences between one group of children and another are attributable to the factor investigated or to some other factor. Thus, internal validity refers to the degree of certainty that the "unwanted" child's social and psychological development (the outcome measure) is attributable to "unwantedness" (the independent variable) rather than some other pre-existing or co-existing factor (e.g., poverty or family instability).[28] Only if the children of denied abortion (the study group) can be equated at the outset with a group of "wanted" children (control group) on all other potentially influential factors except the factor of denied abortion can an acceptable degree of internal validity be achieved. Although perfect matching is impossible, this matching process can be successful if the differences (on confounding variables) that remain between the two groups after matching are no greater than could be expected by chance alone. Then these differences are not statistically "significant." W. Reid & A. Smith, *Research in Social Work* 259-69 (1981). The key problem in this area of research is that women cannot be randomly assigned to wanted or unwanted categories, because they have al-

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[28] For example, a recent study examined all 698 children born on the Hawaiian island of Kauai in 1955, beginning with prenatal histories from mothers and following the children at periodic ages until age 31-32. With the help of innate qualities, support networks, and mediating institutions, many of the children who were identified as "high risk" (subject to four or more serious disadvantages, including poverty, family instability, and dysfunctional parents) "went on to develop healthy personalities, stable careers and strong interpersonal relationships." Werner, "Children of the Garden Island," *Scientific American* 106 (April, 1989). (Denied abortion was not a focus of this study.) *See also*, E. Werner & R. Smith, *Vulnerable But Invincible: A Longitudinal Study of Resilient Youth* (1982).

ready adopted an attitude toward the child. As a result, the research can only be *quasi*-experimental (nonequivalent group design). *Id.* at 155. Internal validity for this type of research depends on the careful selection of a matched control group. As will be seen, this was not achieved in *any* of the various studies examined which purport to find negative consequences from denied abortion. In all of them, the researchers were unable to sufficiently equate the unwanted pregnancy (UP) and accepted pregnancy (AP) groups at the outset. Consequently, the studies fail to isolate unwantedness or denied abortion (rather than other conditions) as the cause of the child's developmental condition.

Henry David's *Born Unwanted: Developmental Effects of Denied Abortion* (1988) is a widely cited work on denied abortion.[29] David examined five major studies of groups (cohorts) of children born to women denied abortion in Europe. Buried in the book, David concedes that "[u]nwanted pregnancy alone does not specifically harm the child's development, but in its wake come a variety of other factors, which collectively appear to influence the development of the child and his or her social integration." *Id.* at 84.[30] But this nuanced statement begs the question. If "unwanted pregnancy" does not specifically harm the child's development, while "other factors" ad-

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[29] David has been an abortion rights researcher for over 20 years (H. David, *Population and Mental Health* (1964)) and an expert witness for abortion rights litigants in at least *Hodgson v. Minnesota* and *Jane L. v. Bangerter*, No. 91-345 (D. Utah). In *Born Unwanted*, the agenda is clear: "involuntary childbearing is rarely conducive to sound public health practice. Unwantedness can pose significant risks for child development, with socially undesirable long-term implications. Hopefully, our attempt to share experiences from Northern and Central Europe will strengthen the worldwide efforts to reduce the incidence of unwanted pregnancy, while maintaining ready access to safe legal abortion for women in need." *Id.* at 22.

[30] Likewise, David concedes: "In sum, the findings around age nine suggested that a woman's originally rejecting attitude toward her pregnancy does not inevitably lead to behavioral difficulties in the child." David at 85-86.

mittedly do affect development, "unwanted pregnancy" cannot be isolated reliably as having any effect on the child's development. Therefore, the flaws in the research, as well as the minimal consequences observed, do not support David's sweeping conclusions, much less a "fundamental" right to abortion in American law.

1. *The Goteborg Cohort.*

In the Goteborg study, Forssman and Thuwe studied 120 children born during 1939-42 to women who were refused abortion sought for psychiatric reasons. David at 37. The control group consisted of the next same-sex child born after each of the study group children in the same hospital or registered in a city hospital. An initial study was conducted at age 21, with a follow-up study at age 35.

The researchers found statistically significant differences in psychiatric care, delinquency, public assistance dependency, and educational level for the children of mothers denied abortion, but there were no statistically significant differences for drunken misconduct, mental retardation, and other categories. David himself reached a tepid conclusion about the findings: "individuals born after refusal of an application for a therapeutic abortion are at greater risk than the controls for adverse psychosocial problems during their developmental years with such differences gradually diminishing in adulthood." David at 19, 45.

However, the authors of a study done in Prague acknowledged that this study was flawed "by the failure to match the study population with controls of similar background." Dytrych, 7 Fam. Plan. Persp. at 165. Significantly more UP children were born out of wedlock (26.7% v. 7.5%); significantly fewer of the UP children lived with both natural parents (50% v. 82%); and socio-economic status was significantly different. David at 39. For these reasons, the results of the Goteborg study cannot be generalized to other settings or populations ("external validity").

2. *The Stockholm Cohort.*

A second, retrospective study conducted in 1963 examined 249 Stockholm women denied abortion. Hook, *Refused Abortion*, Acta Psychiat. Scand. Supp. No. 168, 3 (1963). In this study, there were significant differences between the mothers at the outset. As Hook noted, many of the UP women "had already shown signs of mental disturbance in some form prior to the pregnancy in question" and 10% sought treatment for mental illness before they applied for the abortion. *Id.* at 29, 53. Even so, the percentage of UP children with some mental disturbance (22%) did not differ significantly from the percentage of all Stockholm school children (20%). David at 48.

Subsequently, Hook conducted a follow-up study at age 18 of 88 UP children in Stockholm. David at 48-49. Hook found that more UP children than AP children had a criminal record (20% v. 12%). However, there was no significant difference in overall school performance. The UP children, at age 23, incurred more sick leave and were more likely to have received economic assistance. *Id.* But, this follow-up study has serious methodological flaws. Hook failed to ensure that the interviewer and psychologist were blinded to the group membership of the children (ruling out experimenter expectancy effects). Reid & Smith at 142-43. He also made no attempt to match the two groups at the outset on highly relevant factors such as marital and socioeconomic status. With these flaws, the study has no external validity.

3. *The Swedish Cohort.*

A third researcher examined, over a 15-year period, the development of a group of 90 Swedish children born in 1960. David at 50. The 90 UP children were matched with 90 AP children born in the same hospital. According to David:

> Blomberg observed that all the differences in his study, whether statistically significant or not, were uniformly to the disadvantage of the UP children.

> When taken together, they led to the conclusion that, in the aggregate, the UP children 'grew up in a more insecure environment, performed worse in school, and more often needed treatment for nervous and psychosomatic disorders. There was also a tendency toward worse social adjustment.'

David at 51-52. However, the design flaws with this study render these results scientifically invalid. As with prior studies, no attempt was made to equate the UP and AP children at the outset on other, confounding factors. Moreover, the differences observed were statistically insignificant when UP and AP children who lived with both natural parents were compared. And, as Blomberg and David conceded, many differences were not statistically significant. David at 51. Some differences that were significant diminished over time. *Id.*

4. *The Northern Finland Cohort.*

A fourth study was based on a group of 12,058 children born to 11,931 women in Finland in 1966. David at 103. In contrast to the other studies, "unwantedness" was determined, not by denied abortion, but by statements by the women late in gestation that the pregnancy "should not have occurred at all." *Id.* at 103-104. Once again, the UP and AP children were not equated at the outset in this study. Their families lived under significantly different conditions—UP mothers were more often unmarried, had more children, and lived in lower socio-economic conditions than AP mothers. Although a follow-up study was initiated at age 8, the success of the attempt at pair-matching is not revealed. *Id.* at 107. Differences in school performance were not statistically significant and "no differences" were observed in emotional development. *Id.* Based on the father's occupation, UP families experienced more downward social mobility. David's conclusion is less than compelling:

> On the whole, the follow-up study at age eight showed slightly poorer development among the UP children, which could be ascribed to unwantedness

late in pregnancy or to differences in family social conditions, or to a combination of these factors. *Id.*

5. *The Prague Cohort.*

A fifth study was initiated in 1971 of 220 boys and girls born between 1961-63 to women who requested an abortion twice for the same pregnancy in Prague. Dytrych, *et al.*, 7 Fam. Plan. Persp. at 165-66. This study is promoted by David as the most reliable of the five studies because of its longitudinal basis, its elaborate attempt to match the study group with a control group, and the extraordinarily high number of outcome measures examined.

Yet, the Prague study also suffers from design flaws which render any conclusions from the data scientifically invalid. The researchers in this study went to considerable length to match the study group with a control group. But, despite their claims, they were ultimately unsuccessful in equating the groups at the outset. The UP children were born into lower socioeconomic circumstances. In addition, the UP children were subject to more family instability. The UP mothers were more likely to be divorced (13% v. 8%) and to be married to a man other than the child's father (10% v. 3.6%). A greater percentage of the UP children were not raised by their birth mothers or fathers. Also, a greater percentage of UP children were not living at home (47% v. 29%). Dytrych, 7 Fam. Plan. Persp. at 170. These factors, by themselves, could account for the observed differences between the groups on psychosocial measures.

Furthermore, serious complications that are assumed to result from denied abortion (suicide, homicide, or pathological conditions) are nowhere to be found. As the authors concede, no cases of extreme forms of unwantedness, like permanent isolation, are found in the Prague children. David at 31. The data show that few children suffered significant problems. Only mild differences were seen in behavior at elementary school and in school performance in secondary school. David at 89. No differ-

ences between the UP children and the AP children were observed on many social, psychological and health variables. For example, no differences were seen in adaptation to school. On other variables, differences were observed, but they were not statistically significant: these included visual impairment, hearing impairment, long-term disease, hospitalization, minor accidents or minor surgery, perceptions of "naughtiness" and "stubbornness." Dytrych, 7 Fam. Plan. Persp. at 167. Only frequent acute illness and perceptions of bad temper were statistically significant in being more common among the UP children. *Id.* The researchers frankly concluded in a 1975 article that they "found no gross maladjustment or maladaptation" and that the "expectation that unwanted conceptions would lead inevitably to the children being unwanted proved *not* to be the case." *Id.* at 165.

Only a few mild differences were observed in a follow-up study at the age of 9. No differences were seen in average IQ scores or family relations on recognized scales. David at 88. "Both the UP and the AP children had assessed their relationships with their parents and those of their parents with them in the same positive way." David at 89. Likewise, David conceded: "overall differences between the children born following unwanted conception and the matched controls were not dramatic around nine years of age." David at 84. Those differences that were allegedly statistically significant included school tests on the Czech language.

In a number of ways, the authors strained to find differences between the groups on subjective criteria in order to reach illogical conclusions. For example, they reported that teachers and parents rated the UP children "as significantly less conscientious and more excitable." David at 88. Also, they observed that the UP and AP children perceived their parents differently. David concluded that:

> there is considerably more disagreement between the mother's and father's parental warmth as perceived by the UP subjects in comparison with the AP con-

> trols. UP parents are perceived discordantly, one as warm and the other as cold, which may reflect some kind of compensation mechanism operating in the family.

David at 90. Nevertheless, the authors concede that at age nine "the aggregate differences between the children born following unwanted conception and the control children are not dramatic. . . ." Dytrych, 7 Fam. Plan. Persp. at 171. Yet, they insist on speculating:

> The higher incidence of illness and hospitalization despite the same biological start in life, slightly poorer school marks and performance despite the same level of intelligence, somewhat worse integration in the peer group—all these point to a higher-risk situation for the child and the family, as well as for society.

Id. Of course, they failed to specifically discuss this "higher-risk situation." Still determined to find some deleterious effects of denied abortion, the authors identified "an increased defensive position against stress and frustration" as a "common denominator" among the UP children at age nine:

> If we sum up all the differences between children born from unwanted pregnancies and their controls, concerning performance, attitudes and behavior, one common denominator emerges from the objective data and from the perceptions of mothers, teachers and classmates. In our opinion, this common denominator is an increased defensive position against stress and frustration among the study children. The early and frequent need of such children, especially boys, to achieve satisfaction and to assert themselves is a strong source of stimulation leading to a certain behavior pattern which, in a given situation, is systematically enhanced and may become a more or less permanent trait.

Id. at 171. Most people do not view the need to achieve satisfaction or to assert oneself as inherently negative. In any case, the authors admitted that "[a]t present, this trait is well within the bounds of social viability; there

have been no excessive cases of breakdowns or conflicts that have come to the attention of psychological dispensaries or child psychiatric clinics." *Id.* Yet, they cautioned that "[n]evertheless, there may be a question concerning the future development of these children. What will they be like in puberty and adolescence?" *Id.* at 171.

A misleading analysis in the Prague study is the creation of a "Maladaptation Score" for the children. David at 79-81, 93-94. David reported that "the UP children had significantly higher maladaptation scores than the AP controls." *Id.* at 81. But the methodology in creating this "Score" was completely flawed. The authors observed all marks of differences between the groups on the outcome measures—whether statistically significant or not—and simply added them up. This calculation exploits differences that were not statistically significant and may have occurred by chance alone to render a total score that gives an aura of significance. Furthermore, the "Score" is not a recognized index, nor a scale that has been validated by application to other samples. It was entirely created, for this study, by the authors.

Another serious flaw in this study is the authors' attempt to demonstrate that the UP children suffered from "psychological subdeprivation." David at 84-85. David explains that:

> the relationship is not that of direct rejection of the child by his/her mother and family (which is the exception), . . . Rather, acceptance is incomplete, ineffective, and ambivalent, leading to more or less deviant interactions, less maternal empathy with the child's needs, less understanding of his/her behavioral signals, less warm emotional interchange of stimuli, etc. . . . In the case of unwantedness, the picture takes on a subdued and less dramatic appearance.

Id. at 85. However, like the "Maladaptation Score," the concept of "subdeprivation" was created by the authors; it is not an objective, defined, or recognized psychological term and cannot be found in the authority to which David

refers. *See* J. Langmeier & Z. Matejcek, *Psychological Deprivation in Childhood* 1-23 (3d ed. 1975). Moreover, David provides no data or hard evidence to support such a concept.

A follow-up study conducted at age 14 also found only minor differences. "While intelligence tests were not repeated at ages 14-16, teachers' assessments of intelligence on a rating scale were entirely similar for both groups." David at 88. David stated that difference in school performance between UP and AP children "reached statistical significance." *Id.* However, the data show that the difference observed was not greater failure among UP children but merely that more UP children were average and fewer UP children were found among the above-average or outstanding students. *Id.* Likewise, "a significantly larger number of UP children did not continue their education to secondary school, but instead became apprentices or started jobs without prior vocational training." *Id.* These findings are less than compelling in support of the original thesis that elective abortion is necessary to avert dangerously troubling psychological development.

David claimed to find significant behavioral disorders in the UP children at age 14. The official records indicated that 43 UP children and 30 AP children were referred to child psychiatric and school counseling. David concluded that "although differences in number of referrals were slight, the UP children were seen significantly more often because of serious behavioral disorders requiring therapeutic treatment." David at 87. However, David never provides any data or objective definitions of these "behavioral disorders" or their severity. At 14, UP children were rated "significantly less obedient" than the AP children by their teachers, and the UP children "were seen as either less sociable or more hyperactive than the AP controls." *Id.* at 88-89. With these subjective findings, David reaches strained conclusions:

> Even if the differences in specific indicators are still not very dramatic and easy to detect at the indi-

> vidual level, they are important in the aggregate, having attained increasing statistical significance over time . . . In the social integration and competence of UP subjects as a group and in their school achievements, it is the lack of pluses rather than surplus of marked minuses that becomes most apparent. Still . . . the fact that differences between UP subjects and AP controls persist and have actually widened after nearly 18 years of family life suggests that "unwantedness" during early pregnancy constitutes a not negligible factor for the child's subsequent life.

Id. at 90. However, David provides no basis to support the conclusion that the differences between the AP and UP children "widened" over time or had "an accelerating momentum." *Id.* at 91. In order to conclude that the alleged "widening" occurred, the authors would have had to conduct a special statistical analysis (multivariate analysis of variance). Apparently, no such analysis was done.

Fatal flaws also infected a follow-up study conducted when the children reached age 21-23. There was apparently no effort to remedy the loss of a significant number of subjects, which directly undermines internal validity.[31] Even so, only minor differences were observed: "[e]ducational attainment . . . did not differ significantly," although UP children still showed more average achievement. David at 95. Self-administered personality tests

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[31] This is called differential attrition, which refers to the loss of different types of subjects (e.g., higher-income children or mothers) from one or both groups which may result in a change in the characteristics of the samples. Reid & Smith at 143. Although David suggests that a high percentage of the original participants were examined in this follow-up study (a follow-up rate of 73 percent for UP subjects and 70% for AP subjects) (David at 91), several pages later it is revealed that only 112 of the original 220 matched pairs were available for study, which means that the real follow-up rate was only 50.9%. David at 95. The threat from differential attrition is that the samples over time may change on relevant characteristics for which they were equated at the outset of the study (baseline characteristics), with the result that the UP children that remain may have more diminished characteristics than the original group.

that are accepted as standard measures "did not produce any significant differences between the UP subjects and the AP controls taken as a whole." *Id.* at 98.

The myth of the unwanted child is that unwantedness results in long-term or severe negative impacts on the mother and child. But these studies undermine this myth. Not only are the findings scientifically invalid, the authors strained to find observed differences that were statistically significant. Even those that were allegedly significant showed no gross maladaptation, but merely mild differences, for which David presents no meaningful criteria for demonstrating that abortion would have been better for the children or their families. Can David be taken seriously for suggesting that abortion is socially indicated to prevent unwanted children from "suffering" merely average school performance? Remarkably, these data show that unwantedness and denied abortion cannot be isolated as significant causes of any abnormal or long-term maternal dysfunction or impaired child development. Likewise, short-term negative consequences that are so widely assumed recede into the background as children grow older. Children have a resilience that the emphasis on short-term consequences and options, like abortion, conveniently ignores. Certainly, the data examined here belie the assumptions that formed so much of the rationale of *Roe v. Wade* and its progeny.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed in No. 91-744 and reversed in No. 91-902.

Respectfully submitted,

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